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In the

Supreme Court of the United States

October Term, 1983

No. 83-328

James Mabry, Commissioner, Arkansas Department of Correction ..... *Petitioner*

V.

George Johnson ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

IN THE ABSENCE OF A SHOWING OF DETRIMENTAL RELIANCE, AND PRIOR TO THE ENTRY OF A GUILTY PLEA, DOES A DEFENDANT HAVE A CONSTITUTIONAL RIGHT TO SPECIFIC PERFORMANCE OF A PLEA PROPOSAL WHICH WAS WITHDRAWN 72 HOURS AFTER IT WAS MADE DUE TO A MISTAKE ON THE PART OF THE PROSECUTING ATTORNEY?

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OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, dated May 6, 1983 is reported at 707 F.2d 323 (8th Cir. 1983). Petitioner's Petition for Rehearing En Banc was denied June 30, 1983.

JURISDICTION

Upon Motion by Petitioner, the Eighth Circuit Court of Appeals, by Order entered August 25, 1983, stayed issuance of the mandate until September 1, 1983. Prior to this latter date, a Petition for Writ of Certiorari was presented to this

Court, being submitted within 90 days of the June 30, 1983 denial of the Petition for Rehearing En Banc and thus was timely filed pursuant to 28 U.S.C. §2101. On December 12, 1983, this Court granted the Petition for Writ of Certiorari. This case presents for review the issuance of a writ of habeas corpus by the Eighth Circuit Court of Appeals pursuant to 42 U.S.C. §2254. The basis for this Court's jurisdiction is 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The present case involves the Due Process Clause of the Fourteenth Amendment and, arguably, the Sixth Amendment right to the assistance of counsel.

United States Constitution, Amendment Six:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment Fourteen, Section One:

> §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 23, 1970, respondent George Johnson (respondent, Johnson) was convicted by a circuit court jury in Pulaski County, Arkansas of murder in the first degree and sentenced to a term of life imprisonment. [1] During the course of burglarizing the Little Rock, Arkansas, residence of W. A. Siscoe, Johnson and an accomplice were discovered inside by the occupants. An exchange of gunfire occurred resulting in the death of Vicki Siscoe. Mr. Siscoe and

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[1] At the time of this offense, murder in the first degree was punishable by life imprisonment. Ark. Stat. Ann. §§41-2205, 2227 (Repl. 1964, now repealed) These statutes have been repealed with the adoption of the Arkansas Criminal Code, effective January 1, 1976. Ark. Stat. Ann. §41-101 (Repl. 1977).

respondent were both wounded in the incident. [2] Based on charges arising out of the same incident involving W.A. Siscoe, Johnson was subsequently convicted of burglary

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[2] A more detailed summary of the facts appears in *Johnson v. State*, 252 Ark. 1113, 1114-1115, 482 S.W.2d 600 (1972):

> Mr. and Mrs. W.A. Siscoe and their daughter Vicki [footnote omitted] arrived home from the Siscoe grocery store on the night of May 22, 1970, at about 10:45 p.m. Mrs. Siscoe drove her vehicle into the driveway, parked it and awaited her daughter and husband, who followed her in a vehicle driven by the husband. He stopped his car and the daughter got out, opened the front door and entered the Siscoe dwelling. Her father heard her screaming inside the house and ran inside, armed with a .38-caliber revolver, where he became aware of the presence of an intruder who threatened to kill him and began firing a weapon. When Siscoe returned the fire, the intruder grabbed Vicki, swung her around as a body shield and a scuffle ensued during which Siscoe fired, or attempted to fire over the intruder's shoulder. Shots were fired by the father and by at least one intruder. In the exchange of gunfire, Vicki Siscoe was struck by a bullet from her father's weapon and another from a .22-caliber weapon obviously fired by the intruder. The state medical examiner testified that, in his professional opinion, Vicki's death was caused by a large caliber bullet of the same type as a .38-caliber slug exhibited to him. Both appellant, who admitted his presence in the house at the time, and W.A. Siscoe were wounded. All three wounded persons were admitted to Baptist Medical Center, where Vicki Siscoe died.

See, also, *Johnson v. Mabry, Commissioner*, 707 F.2d 323, 324 (8th Cir. 1983) where the State's evidence was summarized:

> **According to the evidence presented by the state, in May 1970 petitioner and Eddie Jackson broke into the house of W.A. Siscoe with the intent to commit burglary. Mr. and Mrs. Siscoe and their daughter Vicki arrived home in the middle of the burglary. Vicki was the first person to enter the house; she confronted the intruders and screamed. Mr. Siscoe heard Vicki's screams and entered the house. One of the intruders threatened to kill him and grabbed Vicki and used her to shield his escape from the house. At this point shots were exchanged by one of the intruders and Mr. Siscoe. Vicki was fatally wounded, and petitioner and Mr. Siscoe were wounded.**

and assault with intent to kill on June 15, 1971.[3] He was sentenced to a term of 21 years imprisonment on the burglary conviction and 12 years on the assault conviction, said terms to run concurrently. (App. 25) Respondent's first degree murder conviction was reversed by the Arkansas Supreme Court on July 17, 1972 for failure to give a requested jury instruction and the cause was remanded for a new trial. *Johnson v. State*, 252 Ark. 1113, 482 S.W.2d 600 (1972).

For purposes of retrial, the public defender was appointed to represent respondent. On Friday, October 27, 1972, prior to retrial, a deputy prosecuting attorney proposed to defense counsel, Harold Hall, a plea offer. In exchange for Johnson's plea of guilty, the deputy prosecutor would be willing to recommend a twenty-one year sentence to run concurrent with the time Johnson was serving on the burglary and assault charges. (App. 10, 19) (T. 62, Aug. 22, 1979 hearing transcript) On Saturday, the following day, defense counsel went to the penitentiary, met with Johnson and explained the terms of the proposal to him. Johnson indicated his willingness to accept the State's offer. (T. 62-63, Aug. 22, 1979 hearing transcript) On Monday, October 30, 1972, the next working day after the offer had been made, defense counsel called the deputy prosecutor and advised that respondent had accepted the offer to plead guilty for twenty-one years concurrent. The deputy prosecutor responded, however, that a mistake had been made, that the sentence could not be made concurrent but rather, would have to be consecutive to the previously imposed 21 year sentence. (T. 63, Aug. 22, 1979 hearing transcript) There is no indication in the record that this offer was accepted at

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[3]The burglary statute and the punishment imposed at the time of the offense may be found at Ark. Stat. Ann. §§41-1001, -1003 (Repl. 1964) (now repealed with the adoption of Arkansas Criminal Code, effective January 1, 1976. Ark. Stat. Ann. §41-101 (Repl. 1977)).

this time. Thereafter, Johnson's case was assigned to the chief deputy public defender, John Achor.

Respondent's case was set to be retried November 8, 1972. A jury was empaneled that date but a mistrial was declared November 9. (App. 10) Trial was rescheduled for December 7, 1972 then continued to February 26, 1973. On this latter date, Johnson appeared before the trial court and entered a plea of guilty to the charge of accessory after a felony murder.[4] Johnson was sentenced to a term of 21 years, said sentence to be served consecutive to the previously imposed 21 year sentence, resulting in a total of 42 years incarceration. (App. 10, 11)

Johnson sought to have his guilty plea set aside by seeking state post-conviction relief pursuant to Ark. R. Crim. P. 37, Ark. Stat. Ann., Vol. 4A (Repl. 1977). That relief was denied by the trial court July 14, 1977 whose decision was affirmed on appeal in an unpublished opinion rendered by the Arkansas Supreme Court June 5, 1978. (App. 7, 26)

Thereafter, on August 21, 1978, Johnson filed a petition for writ of habeas corpus (42 U.S.C. §2254) in the United States District Court, Eastern District of Arkansas. Johnson was permitted to amend his petition (T. 3, Aug. 22, 1979 hearing) ultimately claiming as grounds for relief ineffective assistance of counsel, mistake and coerced guilty plea. (App. 7, 26) Hearings thereon were held August 22, 1979, October 21, 1980 and December 11, 1980 before the United States Magistrate, Eastern District of Arkansas. On August 28, 1981, the magistrate entered his Report with Recommended Findings and Conclusions in which it was recommended that habeas corpus relief be denied. (App. 6-23) By Order and Judgment entered September 17, 1981, the United States District Court adopted the Magistrate's Findings and Conclusions. (App. 5, 6) As noted in the

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[4]Ark. Stat. Ann. §41-120, 121 (Repl. 1964, now repealed).

district court's written opinion, respondent raised the issue of the withdrawn plea offer as an additional constitutional challenge after the initial hearing in the case. (App. 20) The district court determined that respondent had exhausted available state remedies on the issue and considered the merits of Johnson's contentions. In its analysis of the issue, the district court noted that since the Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971) the plea bargaining process must be attendant with fundamental fairness, and that subsequent caselaw has held that a defendant's right to enforce a plea bargain had been limited to instances in which a guilty plea had been entered. The district court rejected Johnson's argument premised on *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), that he was entitled to specific performance of the withdrawn plea offer because of his expectations that the state would honor its offer. Rather, the district court followed the rationale of *Government of Virgin Islands v. Scotland*, 614 F.2d 360 (3rd Cir. 1980). By extensively quoting from *Scotland*, the district court held that Johnson's sixth amendment right to effective assistance of counsel had not been abridged, that the holding in *Cooper* invaded the province of prosecutorial discretion in the plea bargaining process and that, once the offer was withdrawn, Johnson's right to a jury trial on the murder charge provided an adequate alternative remedy for any alleged breach of agreement by the prosecutor in the context of the present case. (App.6-23)

On appeal to the Eighth Circuit Court of Appeals, the district court's decision dismissing the habeas corpus petition was reversed and the cause remanded with directions to grant the writ of habeas corpus unless the state resentenced Johnson in accord with the concurrent sentence plea proposal within 120 days of the date of the appellate opinion. *Johnson v. Mabry*, 707 F.2d 323 (8th Cir. 1983). The Court of Appeals held that the *Cooper* analysis should be followed, noting that it required the government to honor the terms of its proposed plea offer if they are promptly and unequivocally accepted by a defendant. The

appellate court recognized that the facts here fell short of a plea bargain and noted that Johnson had not entered a plea in open court nor had he relied upon the plea bargain by performing any specific action. It was determined, however, that Johnson had relied "on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney." *Id.* at 328. (App. 33) Specifically, the Court of Appeals found that prosecutorial discretion in the plea bargaining process was not restricted by the *Cooper* analysis and that a jury trial was not an adequate remedy under the circumstances. (App. 24-41)

Petitioner herein sought rehearing en banc which the Court of Appeals denied by Order entered June 30, 1983.

Subsequently, this Court granted petitioner's request for certiorari to review the decision of the Eighth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The concept of fundamental fairness is inherent in the plea bargaining process. A defendant, however, has no right to specific performance of a plea proposal unless he has plead guilty or otherwise relied to his detriment on the plea agreement. *Santobello v. New York*, 404 U.S. 257 (1971) and its interpretive caselaw support this principle.

The State should not be bound to the terms of a plea offer which has merely been accepted by a criminal defendant absent a change in circumstances to the defendant's detriment. In the present case, the prosecuting attorney's plea offer was premised on a mistake, that is, a term of 21 years concurrent was offered instead of a term of 21 years consecutive. Although the respondent accepted the plea offer, the State should not be ordered to specifically perform the terms of the agreement. The record does not indicate the State was unscrupulous in its dealings with Johnson. In the context of the present case, a concurrent sentence would essentially mean that Johnson would serve no time for the murder of the victim. A plea offer should be made in consideration of a criminal defendant on an individual basis and the crime committed.

The State should not be held to an unwise bargain on the premise that, once an offer is made, the defendant's expectations that the government will honor its promises should be fulfilled. Such a premise encourages a rigid rule to be adopted in determining whether plea negotiations should be enforced, thereby precluding a prosecutor's discretion in such matters. Plea bargaining flows from "mutuality of advantage" on the part of the prosecuting attorney and the criminal defendant. The process contemplates fairness to both parties and thus an inflexible rule would defeat this recognized goal.

Defense counsel is not rendered ineffective because the State is permitted to withdraw a plea offer based on an

honest mistake. In Arkansas, any plea agreement made at the time here was subject to the approval of the trial court.

Even though a plea offer has been withdrawn, as here, the defendant is still afforded an adequate remedy since his right to a jury trial remains intact. This is so because the defendant is presumed innocent, has not openly admitted his guilt to the crime and has not otherwise exposed himself or others to criminal liability.

The facts of this case do not include prosecutorial abuse or harrassment in the plea bargaining process. Any effort to curb potential prosecutorial misconduct by advancing a rigid rule that an accepted plea proposal, without more, should be enforced, is not warranted and defeats the goal of fundamental fairness.

ARGUMENT

I.

A CRIMINAL DEFENDANT IS NOT CONSTITUTIONALLY ENTITLED TO SPECIFIC PERFORMANCE OF A PROSECUTOR'S PLEA OFFER AFTER ACCEPTANCE BUT PRIOR TO THE ACTUAL ENTRY OF HIS PLEA OR ABSENT EVIDENCE OF DETRIMENTAL RELIANCE ON THE PLEA AGREEMENT.

This Court has recognized that the plea bargaining process is an important component of the criminal justice system. *Brady v. United States*, 397 U.S. 742 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969); *Blackledge v. Allison*, 431 U.S. 63 (1977). Since this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971)[5] fairness in plea bargaining has been viewed as having constitutional dimensions. *Santobello* and its interpretative caselaw indicate that a defendant's reliance upon a plea proposal is a necessary prerequisite to specific performance of the alleged plea agreement. The State of Arkansas herein was ordered to provide specific performance of a plea agreement absent entry of a guilty plea or other detrimental reliance by the defendant. Petitioner asserts that this holding by the court below in reliance on *Cooper v. United States*, 594 F.2d 12 (4th Cir.

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[5]In *Santobello v. New York*, 404 U.S. 257, 261 (1971) this Court indicated that properly administered plea bargaining is to be encouraged. The Court discussed the desirable benefits of the process as follows:

> It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. See *Brady v. United States*, 397 U.S. 742, 751-752 (1970).

1979) has extended the rationale of *Santobello* to an extreme not constitutionally mandated by the concept of fundamental fairness.

In *Santobello*, the assistant district attorney agreed to make no recommendation with regard to sentencing in exchange for the accused entering a plea of guilty. After acceptance of the defendant's guilty plea, sentencing was set for a later date. A different judge presided at the subsequent sentencing hearing. Likewise, a new prosecutor appeared and recommended that the one-year maximum sentence be imposed, which it was. In ordering that the defendant was entitled to relief, this Court wrote: "When a plea rests in significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. Thus, although an accused has no right to have a guilty plea accepted, once an agreement is reached and the accused enters a guilty plea or relies to his detriment upon the terms of the agreement, the prosecutor is bound to fulfill the terms of the agreement.

In rendering the decision below the Eighth Circuit Court of Appeals abandoned the rationale of *Santobello*, as did the Fourth Circuit in *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), on which the Eighth Circuit relied. In overturning the decision of the district court, the Eighth Circuit Court of Appeals acknowledged that the plea proposal (21 years concurrent) was conveyed to Johnson's counsel on Friday; that on the following Monday, defense counsel attempted to accept the plea proposal; that the prosecuting attorney indicated a mistake had been made and the sentence must be consecutive rather than concurrent; that Johnson did not enter a plea of guilty in reliance on the proposal; and that Johnson had not performed any specific action in reliance upon the proposal. See (App. 25-26, 31-33) Although expressly rejecting the rigid applicability of contract law principles, the Eighth Circuit Court of Appeals found that Johnson had relied upon the plea proposal to the

extent that he had considered the terms offered, agreed to accept the proposal and communicated his willingness to plead guilty to the prosecuting attorney. See (App. 31-33)

Likewise in *Cooper*, the government attorney's plea proposal was made and withdrawn on the same date as the attempted acceptance by defense counsel. [6] Noting that the Court in *Santobello* emphasized fairness in the plea bargaining process, the Fourth Circuit indicated, however, the source and right of the fairness concept was not identified other than as being of constitutional origin. Even though Cooper had not entered a plea or performed any other obligation contained in the proposal, the Court of Appeals held that under appropriate circumstances a constitutional right to enforce a plea proposal may arise before any technical "contract" right has been formed, and on the basis of expectations reasonably formed in reliance upon the

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[6] *Cooper v. United States, supra* was an appeal from convictions on two counts of bribing a witness in which error was claimed in the district court's refusal to enforce the government's plea proposal.

Cooper had become an informant for the government. He offered to remove himself as a witness against one Simpson for $10,000 and further agreed to flee to Mexico. Phone calls between Cooper and Simpson were recorded resulting in Cooper's arrest.

Around 11 a.m. on May 11, 1977, two months before Cooper's trial, the government's attorney proposed the following plea agreement, to wit, (1) Cooper would be removed from the witness protection program; (2) Cooper would remain incarcerated; (3) he would continue to cooperate with federal authorities; (4) he would plead guilty to one count of obstruction of justice; and (5) he would present testimony on three occasions in on-going trials involving narcotics violations.

Cooper was immediately advised of the proposal by defense counsel, and agreed. Defense counsel attempted to contact the government's attorney around noon but was unsuccessful. Around 1:30 p.m. the United States attorney advised his assistant to withdraw the offer. When defense counsel and the assistant made telephone contact between 2:30 and 3:30 p.m., Cooper's counsel was advised at the outset that the offer had been withdrawn. 594 F.2d at 13-14, 15.

honor of the government. 594 F.2d at 18. Not only did *Cooper* identify a new "right", it further identified two sources of that right, to wit, (1) the right to fundamental fairness embraced in substantive due process and (2) the Sixth Amendment right to effective assistance of counsel. Although due process was not explicitly discussed because its applicability was too plain, 594 F.2d at 18, effectiveness of defense counsel was determined to come into play on the theory that a defendant's confidence in his attorney's capability and professional responsibility may be jeopardized when the government attempts, through defense counsel, to change or retract a proffered plea agreement. The Fourth Circuit held that Cooper was entitled to have the plea offer specifically enforced since a specific, unambiguous and not unreasonable proposal should be accepted based on constitutional fairness if a defendant promptly accepts and extenuating circumstances previously unknown have not intervened.[7]

Petitioner contends that the *Cooper* analysis and the rationale of the Court of Appeals below are not consistent with the decision in *Santobello* and later caselaw. Petitioner's assertion is supported by the Third Circuit's out-

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[7]The Fourth Circuit listed a number of factors which led it to conclude that Cooper's counsel had been rendered ineffective because of the government's failure to honor the plea proposal: (1) the proposal was specific and unambiguous in form and made without reservation related to a superior's approval or otherwise; (2) the content of the proposal was reasonable in context; (3) the proposal was made by a prosecutor with apparent authority at the time; (4) the proposal was promptly communicated to the defendant and thus no question of staleness was presented; (5) Cooper assented promptly and unequivocally to its terms, indicated his assent to counsel and was entitled to assume that when acceptance was communicated to the government, the plea agreement would be consummated; (6) within hours, defense counsel communicated acceptance to the government but by "sheer fortuity" was told of the withdrawal before actual acceptance could be communicated; and (7) the reason for withdrawal did not concern any intervening government or public interest unknown at the outset but lay "simply" in a superior second-guessing a subordinate. *Cooper v. United States*, 594 F.2d at 19.

right rejection of *Cooper* in the subsequently decided case of *Government of the Virgin Islands v. Scotland*, 614 F.2d 360 (3rd Cir.1980). In reviewing what the Third Circuit considered to be facts so similar as those in *Cooper* that alleged distinctions were "specious", 614 F.2d at 363, note 5, the appellate court refused to order specific performance of an unconsummated plea agreement absent detrimental reliance by the defendant. [8] In other words, specific performance of a prosecutor's plea offer is required only when a defendant has plead guilty or can establish that he detrimentally relied on the prosecutor's promise to such an extent that a fair trial is no longer possible. The *Scotland* Court rejected *Cooper's* indication that defense counsel could be rendered ineffective by an unconsummated plea bargain absent detrimental reliance, noting that (1) no plea offer may be made at all and (2) the proper focus of this issue is on defense counsel's performance and not defendant's perception of it. 614 F.2d at 363. In reaching its ultimate conclusion of refusing to specifically enforce the plea offer, *Scotland* held that binding the prosecutor to his original offer, under the circumstances, interfered with prosecutorial discre-

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[8] In *Scotland*, the facts indicated that on November 3, 1978, Springette, a co-defendant with Scotland, was charged with two counts of burglary and two counts of grand larceny (78-219). In two other cases pending against Springette, the charges were grand larceny and buying and receiving stolen property (78-147) and third degree burglary (78-200).

After arraignment on November 11, 1978, where Springette plead not guilty, the Assistant United States Attorney offered the following plea bargain, *viz.*, Springette would plead guilty to third degree burglary (78-219) or in the other charge (78-200) and to a misdemeanor in 78-147. The government's position on sentence recommendation would depend on Springette's willingness to testify against Scotland in 78-219. The proposal was communicated by defense counsel to Springette who agreed to plead guilty in 78-200 and 78-147 if 78-219 was dismissed. Springette refused to testify for the government in 78-219. Upon learning of Springette's acceptance, the Assistant United States Attorney added another condition. Springette sought to have the initial plea proposal enforced and the district court refused. *Government of Virgin Islands v. Scotland*, 614 F.2d at 361-362.

tionary functions. 614 F.2d at 364-365. The most compelling reason for the result reached in *Scotland*, however, was that the defendant's right to jury trial as an available alternative remedy remained intact upon the prosecutor's withdrawal of the plea offer. 614 F.2d at 365.

Both prior to *Cooper* and *Scotland* as well as subsequent thereto, several courts have rendered decisions on the issue presented for this Court's review. The great weight of authority is to the effect that a state or government prosecutor should not be bound by the initial plea proposal, whether accepted or not, unless the defendant has entered his plea of guilty or taken some action in detrimental reliance thereon. Caselaw indicates that other courts

consider this the appropriate rationale to be followed in light of *Santobello v. New York, supra.* [9]

Petitioner urges this Court to resolve the conflicting holdings indicated by the decisions of the Fourth and Eighth Circuits and the decision of the Third Circuit by adopting the rationale of what appears to be the greater weight of authority and the better rule of law. Analyzing the facts of the instant case in terms of the reasoning announced in these conflicting opinions demonstrates peti-

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[9]Consider: *State v. Wheeler*, 95 Wash. 2d 799, 631 P.2d 376 (1981) (plea proposal offered by prosecutor withdrawn either before or after acceptance after interviews with witnesses and reaction by victim's family; *Cooper* analysis rejected, noting no constitutional right to plea bargain; citing *Weatherford v. Bursey*, 429 U.S. 545 (1977); enforcing bargain before plea entered would inhibit prosecutor's use of plea bargaining and defendant has adequate remedy since has right to jury trial); *Commonwealth v. Smith*, 427 N.E.2d 739 (Mass. 1981) (prosecutor offered plea proposal as "package deal" to defendant and co-defendant, but co-defendant refused and both went to trial; co-defendant ultimately plead guilty and defendant was convicted but sought to enforce plea proposal; test for whether there was an enforceable promise was whether defendant had reasonable grounds for interpretation of the bargain and whether defendant relied on prosecutor's promise to his detriment; opinion indicates prosecutor's promise can be enforced on promise of fundamental fairness but would not go as far as *Cooper* absent detrimental reliance since defendant has adequate remedy in jury trial); *People v. Barnett*, 113 Cal. App. 3d 563, 170 Cal. Rptr. 255 (1981) (prosecutor made package plea proposal to defendant and co-defendant, the latter refused and trials were severed; defendant tried and convicted, co-defendant plead guilty; decision held no due process rights violated because co-defendant received "better deal"; *Scotland* rationale followed finding that due process is satisfied if defendant is permitted to go to trial); *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980) (written plea agreement entered by defense counsel and assistant district attorney; another district attorney refused to honor plea bargain on grounds it was inappropriate to severity of charges; decision rejected *Cooper* rationale and found weight of authority to effect that State may withdraw from plea bargain at any time prior to, but not after, the actual entry of guilty plea by defendant or any change in position by him constituting detrimental reliance on the agreement; further, state law requires judicial approval and lack thereof renders agreement null and void); *State v. Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (1980) (plea offer accepted by defendant but

withdrawn by prosecutor prior to actual entry of plea; *Cooper* analysis rejected; opinion held that state may withdraw from plea bargain prior to defendant's entry of guilty plea or prior to other action taken by defendant to his detriment, relying on *Scotland* and weight of authority; defendant exercised right to jury trial and made no claim that prosecutor abused his discretion and withdrew offer as means to test will of defendant); *State v. Edwards*, 279 N.W.2d 9 (Iowa, 1979) (offer made by prosecutor accepted by defendant but offer withdrawn prior to entry of plea on grounds that another assistant had decided to file on original felony charge; opinion rejects *Cooper* rationale finding that *Santobello* cannot logically be extended to require specific performance of plea proposal where defendant has neither plead guilty nor detrimentally relied on agreement); *State v. Reasbeck*, 359 So.2d 564 (Fla. App. 1978) (plea agreement reached but offer withdrawn prior to entry of guilty plea; lower court held to have impermissibly ordered specific performance where state law provides that the plea negotiations are not binding until formally accepted by trial judge and until then, offer can be withdrawn by either party; defendant here had not relied to his legal detriment on mere offer of the State); *State ex rel Gray v. McClure*, 242 S.E.2d 704 (W. Va. 1978) (prosecutor and defendant reached plea agreement which was approved by trial judge; new prosecutor elected and case transferred to new judge; new prosecutor refused to honor agreement; opinion indicated state not bound to terms of inchoate plea agreement where defendant has not plead guilty or otherwise relied to his detriment; cause remanded to develop record on whether defendant had relied to his detriment); *People v. Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (1978) (plea bargain offered and accepted by defendant; prior to entry of guilty plea, offer withdrawn by prosecutor on grounds it was contrary to charging policy, trial court's order reinstating plea agreement set aside on appeal, noting that *Santobello* and its progeny require specific performance only after plea of guilty entered and defendant has been prejudiced by prosecutor's failure to perform; prosecutor should not be bound by unwise plea agreement especially where defendant has not been prejudiced); *Shields v. State*, 374 A.2d 816 (Del. 1977) cert. denied 434 U.S. 893 (1977) (plea offer by attorney general communicated to defendant but unilaterally withdrawn several weeks later; opinion held that bargain was not enforceable since defendant had not plead guilty or detrimentally relied, citing weight of authority; defendant was unable to substantiate his claim that the government had gained valuable information by the plea agreement).

Compare, *U.S. v. Society of Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1980) (citation to *Cooper*, but conclusion reached that defendant relied on promise of immunity); *United States v. McIntosh*, 612 F.2d 835 (4th Cir. 1979) (*Cooper* distinguished; offer made by state prosecutor held not binding on federal prosecutor, thus no binding agreement).

tioner's position that the interests recognized and sought to be protected in the plea bargaining process as announced in *Santobello v. New York*, 404 U.S. 257 (1971) are best served by adhering to the concept that the State is not bound by a plea agreement until the accused enters a guilty plea or otherwise relies to his detriment on the government's plea proposal.

Johnson's original murder conviction was reversed and remanded for new trial on July 17, 1972. (App. 7, 25) *Johnson v. State*, 252 Ark. 1113, 482 S.W.2d 600 (1972). On August 21, 1972, he appeared for arraignment on the murder charge. (App. 4) A period of six months passed from the date of respondent's arraignment until he ultimately entered a plea of guilty to the charge of accessory after felony murder. During this six month period Johnson, for 72 hours, was placed in the position of having his psychological expectations center around a plea proposal that was based on an honest mistake made by a deputy prosecuting attorney. Although the decision of the court below relied heavily on the duty of the government to negotiate with scrupulous fairness, there is nothing in the opinion nor in the record to indicate the state in the present case was anything but scrupulous. The evidence tended to establish only that an honest mistake had been made by the prosecutor. Thus, this is not a case in which the prosecutor abused his discretion by revoking an otherwise acceptable plea proposal to test the will of the defendant regarding his guilt or desire to be retried. [10]

It should not be forgotten that Johnson had previously been convicted of first degree murder and sentenced to life imprisonment. He had likewise been convicted of burglary and assault with intent to kill a second victim in connection

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[10] See, e.g., *State v. Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (1980), n. 9 supra. In holding that the State could withdraw the plea proposal, it was noted that the defendant made no claim that the offer was withdrawn to test the will of the defendant.

with the same incident, for which he was serving twenty-one years. The State's desire to judicially economize by seeking to forego the expense of retrial while at the same time vindicate the interests of the public by seeking appropriate punishment for the person responsible for these crimes was not unreasonable. Thus, the plea offer should be made in consideration of a criminal defendant on an individual basis in terms of the sentence imposed compared to the crime committed. [11] In the context of the present case, 21 years concurrent with time already being served is disproportionate not only to the defendant herein who had two prior felonies, but also to the heinous nature of the crime itself, murder of a young girl as she was being used as a shield by one of the intruders in her family's home during the course of a burglary. The right to expect that the government will honor its promises not only extends to the defendant but the public at large of which the defendant and the Siscoe family are members. Were the mistaken plea proposal thus enforced here, Johnson in effect would serve no time for the murder of Vicki Siscoe.

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[11] See, *Corbitt v. New Jersey*, 439 U.S. 212, note 14 (1978); See also, *Corbitt v. New Jersey*, 439 U.S., at 231-232, Stevens, J., dissenting.

In *Government of the Virgin Islands v. Scotland*, 614 F.2d 360 (3rd Cir. 1980) the Third Circuit stated that binding the prosecutor to his original plea offer was an interference with his discretionary functions, "i.e., determining what he feels is fairest in light of the defendant's circumstances, the government resources, and the statute involved." Id. at 364. In note 13 cited to this quoted passage, the Third Circuit cited *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) in recognition of this Court's reluctance to interfere in prosecutorial charging matters and plea bargaining. The additional cite in note 13 is omitted. 614 F.2d at 364-65.

The *Scotland* Court determined the role of the prosecutor had at least four possible functions:

> (1) to act as an administrator and dispose of cases in the fastest, most efficient manner; (2) to act as an advocate for the state to maximize convictions and severity of sentences; (3) to judge the individual's social circumstances and ensure fairness; (4) to act as a quasi-legislator, granting concessions because the law is too harsh. [11] Citing, at n. 11, See *Alschuler, The Prosecutor's Role in Plea Bargaining*, 36 U.Chi.L.Rev. 50, 52-53 (1967) Id. at 364.

Besides the obvious fact that an unwise bargain will be struck, holding the prosecutor to his admitted honest mistake in the present case precludes the exercise of discretion inherent in the office the prosecutor holds on behalf of the people of the state of Arkansas. [12] Acknowledging a prosecutor's wide degree of discretion this Court recently held that due process was not violated by a prosecutor's threat to a defendant to seek a second indictment and thereby expose him to a more severe punishment if that defendant did not plead guilty to the initial charge, saving the court inconvenience and necessity for trial. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Recognizing that plea bargaining flows from "mutuality of advantage" [434 U.S. at 363], this Court rejected the notion of "a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense [since it] could only invite unhealthy subtrefuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." 434 U.S. at 365. Citing *Blackledge v. Allison*, 431 U.S. 63, 76 (1977).

Just such a "rigid rule" is encouraged by the Eighth Circuit in the instant case as well as by the Fourth Circuit in *Cooper* if the State is held to the terms of the plea offer mistakenly made to Johnson. Although the Eighth Circuit Court of Appeals discounted the utility of contract prin-

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[12] In Arkansas, the qualified electors of each judicial circuit shall elect a prosecuting attorney whose term of office is two years. Ark. Const. Art. 7, §24. Prosecutions are sought on behalf of the State of Arkansas. Ark.R.Crim.P. 1.5, Ark. Stat. Ann. Vol. 4A (Repl. 1977).

ciples in reaching its result in the case at bar, [13] the contract analogy was manifestly applied when that court held that the defendant demonstrated reliance by hearing the pro-

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[13] In announcing its holding to follow the *Cooper* rationale, the Eighth Circuit appeared to reject any analogy to contract principles. In so doing it stated:

> 'Plea bargaining involves more than commercial law. Because the entry of a guilty plea constitutes a waiver of fundamental constitutional rights, *Santobello v. New York*, 404 U.S. at 264 (Douglas, J., concurring), plea bargains are not just contracts in which the prosecution exchanges the dismissal or reduction of charges and recommendations on sentencing for the defendant's guilty plea. Imposing on the government the duty to conduct plea bargaining with scrupulous fairness, which, in the present case, would require the government to honor the terms of its plea proposal, is consistent with the "fairness" requirement set forth in *Santobello*. As noted in *Cooper*, "constitutional decisions cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals. 594 F.2d at 17.' *Johnson v. Mabry*, 707 F.2d at 329.

posal, considering it and then accepting it. [14] Such a result is too rigid and mechanical in application. The goal of plea bargaining announced in *Santobello* was fundamental fairness, not technical precision.

Petitioner agrees with the principle that the state prosecutor and his subordinates must keep each other informed regarding the plea bargaining process and further, should strive to organize that procedure so that plea negotiations are fairly conducted and scrutinized in order to preclude their arbitrary and inconsistent use. These ideals, however, must be considered within a proper framework in order to assess their practical utility, *viz*, the day-to-day volume of business handled in the many prosecutors' offices

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[14] The Eighth Circuit stated:

"The analogy between contracts and plea agreements works well in the usual plea bargain case, which involves the entry of a guilty plea, or the performance of some other action, following plea negotiations and an agreement about specific terms. *E.g., United Stats v. Runck*, 601 F.2d 968, 980 (8th Cir. 1979) (on petition for rehearing) (following entry of negotiated plea, dispute arose over whether part of sentence was within plea agreement accepted by district court). Traditional contract principles, however, are of little guidance in a plea proposal case like the present one. Here, as in *Cooper* and *Scotland*, we are confronted with a fact situation that falls short of a plea bargain. Petitioner did not enter a plea of guilty in court and has not performed any specific action in reliance upon the plea bargain. *Compare Palermo v. Warden*, 545 F.2d 286, 290 (2d Cir. 1976) (defendants offered reduced sentences and early parole in exchange for return of stolen jewelry); *see United States v. Bowler*, 585 F.2d 851, 852 (7th Cir. 1980) (plea agreement provided for dismissal of counts and recommended sentence if defendant cooperated in further prosecutions and other investigations). However, petitioner did rely on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney." (footnotes omitted)

Johnson v. Mabry, 707 F.2d at 327-328 (8th Cir. 1983)

not only in Arkansas but also throughout the country. [15] Statistics show that plea bargaining disposes of the majority of criminal cases brought through the different jurisdictions of the United States. [16] Tying up the plea bargaining process by requiring adherence to a rigid set of guidelines

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[15]The Fourth Circuit in *Cooper* found paramount the defendant's right to enforce a plea proposal based on his expectations reasonably formed that the government will honor its proposals. *Cooper v. United States*, 594 F.2d at 18. By comparison, the burden on the government was determined to be minimal in efforts that could be undertaken to ensure that a defendant is not disappointed, viz, plea negotiations must be entered into by an authorized agent of the government; government agencies must keep officials informed of the progress of plea bargaining; the government can delineate the precise line of authority of its agents; the government can "incorporate reservations relating to higher level approval routinely in all proposals or specially in some," and routinely require plea proposals be documented by signed memoranda. Id. at 20.

Along the same vein, the Eighth Circuit Court of Appeals suggested that conditional proposals could be made and that the government could withdraw or modify offers that have been made but not yet accepted or rejected after a reasonable period of time. Generally, it was suggested that the government become better organized and engage in in-house scrutiny of plea proposals before they are discussed with defense counsel. *Johnson v. Mabry*, 707 F.2d at 330.

[16]See, e.g. In the United States District Courts, out of a total of 35,391 defendants convicted and sentenced, 29,814 plead guilty and 709 entered pleas of nolo contendre. Source: Detailed Statistical Tables, Annual Report of the Director of the Administrative Office of the United States Courts for the twelve month period ending June 30, 1983.

In the United States District Courts, figures for the fiscal year 1972, reflect that 39,587 defendants were convicted and sentenced. Of those, 33,677 entered pleas of guilty or nolo contendre.

In the United States District Courts, figures for the fiscal year 1973 reflect that 37,261 defendants were convicted and sentenced. Of these, 30,852 entered pleas of guilty or nolo contendre.

Source: Annual Report of the Director of the Administrative Office of the United States Courts, 1970-1979, Criminal Statistical Tables, Table D-7.

to be kept in every case would be counterproductive to this Court's announced recognition that expediting disposition of criminal cases benefits not only the defendant but the public as well. [17]

Petitioner suggests that due to the sheer volume of criminal prosecutions, it is unreasonable to suggest that all plea proposals not only be reduced to writing but also that supervisory approval of plea proposals be gained before they are formally submitted to defense counsel. Equally unreasonable is the suggestion that only specific prosecutors have plea bargaining authority since virtually all criminal prosecutions possess the potential to be expedited by plea negotiations.

Placing constraints on a subordinate prosecutor's authority in making a plea offer, in the context of the present case, still would not prevent a deputy prosecutor from making an honest mistake in the initial plea offer. In other words, strict policy rules defining the circumstances under which a plea offer can be made will not prevent a newly hired deputy prosecutor from being nervous when making a

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[17] *Santobello v. New York*, 404 U.S. 257, 261 (1971), Note 1, supra.

In *Brady v. United States*, 397 U.S. 742, 752 (1970) the mutuality of advantage inherent in the plea bargaining process was discussed as follows:

> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious – his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages – the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. [footnote omitted]

plea proposal and confuse the terms consecutive with concurrent. Nor will it prevent an experienced prosecutor, even with supervisory authority, from making a slip-of-the-tongue in his usage of the words concurrent and consecutive on a busy Friday afternoon. Thus, it is one matter to hold that the government should honor its promises made to criminal defendants who have explicitly taken action in reliance thereon. But extending that rationale to the extreme as here, imposes on the government and its prosecutorial agents a higher, if not impossible standard, that when they negotiate a plea proposal they not only must be scrupulous but perfect as well.

The thrust of both the *Cooper* opinion and especially the opinion below was to place blame and responsibility on the government for what these courts concluded was an unfortunate situation for the respective defendants created at the hands of the government. Both courts believed themselves constrained to take the position they did in order to curb the potential abuse by prosecutors who allegedly take advantage of defendants. [18] In this regard, the record before this Court, as previously indicated, contains no evidence that the prosecutor intentionally misled Johnson, impermissibly tested his will so as to examine the strength of Johnson's guilt or innocence, or otherwise abused the plea bargaining process. A case of prosecutorial abuse could have been presented here had the deputy pro-

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[18] The *Cooper* Court appeared concerned with indiscriminate withdrawals of plea proposals even though the record did not indicate free withdrawal of plea proposals to "test the wills and confidence of defendants" or to deliberately harass them. It stated that it must recognize, however, "that our failure to find constitutional right and violation in this case would necessarily give judicial approval to a practice whose possibilities for easy abuse, or at least the appearance of abuse, are abundantly clear." *Cooper v. United States*, 594 F.2d 12, 20.

The Eighth Circuit Court of Appeals was likewise unable to find prosecutorial abuse in the circumstances at hand. *Johnson v. Mabry*, 707 F.2d 323, 330 (8th Cir. 1983).

secutor, upon learning of Johnson's acceptance of 21 years concurrent, advised defense counsel that the mistake was that of defense counsel's, contending the offer made was 21 years consecutive. Such was not the case here since the deputy prosecutor admitted his mistake and by doing so dealt forthrightly with the defendant, thus keeping the plea bargain here from reverting back to the shadows. *Bordenkircher v. Hayes*, 434 U.S. at 365.

When the State's plea offer was withdrawn, Johnson reassumed the identical posture he occupied the preceding Friday before any offer was made, i.e., he faced retrial by jury on a charge of first degree murder. The record is void of evidence which would tend to indicate that during this 72 hour period, Johnson in any way relied on the proposal to his detriment or otherwise changed his position to the extent that he would not evenually be tried fairly. The plea offer was withdrawn October 30, 1972. Johnson's trial commenced November 8 but a mistrial was declared November 9. The rescheduled trial date of December 7, 1972 was continued until February 26, 1973. On this date, Johnson admitted his guilt in open court to the crime of accessory after a felony murder and was sentenced to a term of 21 years to be served consecutively to his previously imposed sentences.

Petitioner notes that the district court made an independent finding that defense counsel was ineffective in his representation of Johnson. That finding, however, was not connected in any fashion to the withdrawn plea offer. Rather, that conclusion was based on defense counsel's failure to attempt to locate and interview Eddie Jackson, Lacy Gordon and Benny Kelley. The district court concluded, however, that Johnson had failed to establish prejudice from defense counsel's omissions. (App. 15-18) Thus, nothing in the opinion of the Eighth Circuit Court of Appeals indicated that the change in the proposed plea agreement in the present case resulted in either a loss of confidence in the accused's attorney or in any way hindered defense counsel in his ability to defend Johnson.

Under Arkansas law, in effect at the time, the trial court was under no obligation to accept a negotiated plea or adhere to any sentencing recommendation made to Johnson by the prosecuting attorney. *Meyers v. State*, 252 Ark. 367, 369, 479 S.W.2d 238 (1972). [19] Thus, it is illogical to hold that defense counsel is rendered ineffective by the State's withdrawal of a mere offer to plead when at the time, any negotiated plea agreement was subject to being rejected by the trial court. The proper focus should be on defense counsel's performance presumably in attempting to negotiate a plea agreement with the government, not on the fact that a plea offer has been withdrawn by the State before the defendant enters a plea of guilty. In accord, *Government of the Virgin Islands v. Scotland*, 614 F.2d 360, 363 (3rd Cir. 1980); *State v. Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (1980) (argument that counsel is rendered ineffective, not supported by logic; defendant may lose faith when plea agreement is not accepted by the court and attorneys should advise clients that plea bargain may not come to fruition); *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980) (State law requires judicial approval; otherwise plea bargain null and void); *State v. Reasbeck*, 359 So.2d 564 (Fla. App. 1978) (same); *People v. Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (1978) (same).

Although Johnson opted to plead guilty rather than be tried to a jury, petitioner contends that the availability of

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[19] Present Arkansas law provides that a plea agreement is not binding on the trial judge but the court may permit the agreement to be disclosed to him and may concur therein:

> RULE 25.1 Propriety of Plea Discussions and Plea Agreements.
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> (a) In cases in which it appears that it would serve the interest of the public in the effective administration of justice, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He shall engage in plea discussions and reach a plea agreement with the defendant only

through defense counsel, except when the defendant has waived or refused his right to be represented by appointed or retained counsel.

(b) Similarly situated defendants shall be afforded equal opportunities for plea discussions and plea agreements.

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RULE 25.3 Responsibilities of the Trial Judge.

(a) The judge shall not participate in plea discussions.

(b) If a plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that the charge or charges will be reduced, that other charges will be dismissed, or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate whether he will concur in the proposed disposition. If, after the judge has indicated his concurrence with a plea agreement and the defendant has entered a plea of guilty or nolo contendere, but before sentencing, the judge decides that the disposition should not include the charge or sentence concessions contemplated by the agreement, he shall so advise the parties and then in open court call upon the defendant to either affirm or withdraw his plea.

(c) If the parties have not sought the concurrence of the trial judge in a plea agreement or if the judge has declined to indicate whether he will concur in the agreement, he shall advise the defendant in open court at the time the agreement is stated that:

(i) the agreement is not binding on the court; and

(ii) if the defendant pleads guilty or nolo conendere the disposition may be different from that contemplated by the agreement.

(d) A verbatim record of all proceedings had in open court pursuant to subsections (b) and (c) of this rule shall be made and preserved by the Court.

Ark. R. Crim. P. 25.1, 25.3 Ark. Stat. Ann. Vol. 4A (Repl. 1977).

that remedy removed any claim of prejudice Johnson might have. [20] As indicated by the Third Circuit in *Scotland*, the prosecutor has no duty to enter into plea bargaining and thus there is no rationale for finding a jury trial is sufficient for a defendant who has not been offered a plea proposal and insufficient for a defendant who has. 614 F.2d at 365. This rationale is consistent with this Court's previous recognition that there is no constitutional right to a plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). [21] The Third Circuit indicated that to hold that the right to a jury trial was not an adequate remedy under the circumstances would result in belittlement of that fundamental right. *Government of the Virgin Islands v. Scotland*, 614 F.2d 360, 365 (3rd Cir. 1980). In *Corbitt v. New Jersey*, 439 U.S. 212 (1978), this Court considered a New Jersey statutory scheme which authorized assessment of different sentences in murder prosecutions depending on whether the accused was tried to a jury or entered a plea of non vult or nolo contendere. Recognizing the importance of the plea bargaining process, by analogy, the majority opinion acknowledged that a statutory framework for entering a guilty plea may confer more of a benefit of leniency on the accused than on one who stands trial. 439 U.S. at 223-224. That consideration was not fatal to the statutes under consideration, however, because one who stands trial and

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[20] The Eighth Circuit Court of Appeals gave little consideration to whether the right to a jury trial would adequately remove any prejudice Johnson might claim, focusing primarily on its effort to curb prosecutorial abuse even though there was no evidence of such abuse in the record. In addition, the court below found that a jury trial would not provide Johnson with "the benefit of the bargain, that is, jury trial will not protect the defendant's reasonable expectations that the government will honor its proposals." *Johnson v. Mabry*, 707 F.2d 323, 330 (8th Cir. 1983).

[21] In *Weatherford v. Bursey*, 429 U.S. 545 (1977) defendant's argument that the presence of an undercover agent during conferences with defense counsel lost the defendant his right to plea bargain was rejected. "It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." 429 U.S. at 561.

elects to contest his guilt also might be acquitted or convicted of a lesser degree of homicide. 439 U.S. at 225. Moreover, the right to a jury trial also affords the accused the right to force the government to its proof to make its criminal case against him without his aid. *Corbitt v. New Jersey*, 439 U.S. at 233, and note 6, Stevens, J. dissenting.

Johnson, upon withdrawal of the plea offer, remained cloaked with the presumption of innocence and assumed the posture of again forcing the State to try to convince the jury that he was guilty. Petitioner urges, therefore, that the right to a jury trial was an adequate alternative remedy which removed any prejudice Johnson could claim from his consideration of the prosecutor's plea offer. This is especially true since Johnson had not already entered a guilty plea, i.e., openly admitted his participation in the crime and thereby waived all rights attendant an accused in a criminal prosecution. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (A plea of guilty is more than a confession, it is a conviction with nothing left but judgment and punishment.); *Brady v. United States*, 397 U.S. 742, 758 (1970) (same). Neither had Johnson otherwise exposed himself to criminal liability in any other case for which he could be prosecuted. Nor had he subjected himself to the risk or threat of physical harm from persons he might have implicated in this or any other criminal investigation. See, e.g., *People v. Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (1978) (Michigan appellate court found defendant had suffered no prejudice since he had not made any inculpatory statements nor had he been precluded trial preparation time while he considered the State's offer for one day before accepting it prior to its withdrawal); *Shields v. State*, 374 A.2d 816 (Del. 1977) *cert. denied* 434 U.S. 893 (1977). (defendant not entitled to have plea proposal enforced even though accepted but later withdrawn by prosecutor, noting that defendant did not substantiate his claim that government gained valuable information by plea agreement).

Petitioner urges this Court to refuse to follow the reasoning of *Cooper* and the opinion below. In so conten-

ding, petitioner notes that the Fourth Circuit, prior to its decision in *Cooper*, had expressly held that the government would not be permitted to breach its promise to a defendant regarding plea negotiations if that defendant had relied to his prejudice. *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), aff'd on remand 490 F.2d 1407, *cert. denied* 417 U.S. 933 (1974). In *Carter*, the defendant was promised, by a government prosecutor in the District of Columbia, that if he incriminated himself and others, he would not be prosecuted anywhere else for the commission of crimes he divulged. The case came before the Fourth Circuit upon contemplation of defendant's further prosecution in the Eastern District of Virginia. The Fourth Circuit considered of paramount importance imposition of checks on government attorneys who make bad bargains noting the probability of multistate prosecutions by the federal government. The court noted that in such situations, the solution lay in administrative controls promulgated by the United States Attorney General and that at stake, was "the honor of the government, public confidence in the fair administration of justice and the efficient administration of justice in a federal scheme of government." Id. at 428. In an addendum to the opinion, it was noted that this Court had subsequently decided *Santobello v. New York*, 404 U.S. 257 (1971) and that the holding in *Carter* was consistent therewith. *United States v. Carter*, 454 F.2d 426, 428-429.

The Eighth Circuit Court of Appeals cited *Carter* in *United States v. Minnesota Mining and Manufacturing Co.*, 551 F.2d 1106 (8th Cir. 1977) when it too held that a defendant in a plea agreement who fully discharges his obligations, is entitled to have the government honor the agreement. Unlike the situation in *Carter*, however, the Eighth Circuit did not appear to be addressing alleged bad faith on the part of the prosecuting attorney. Rather, the opinion centered more on the defendant's fulfillment of the agreement and thus, his reliance to his detriment on the government's promise.

As indicated earlier, both the Fourth and Eighth Circuits in the opinion in *Cooper* and that below, have assumed their particular positions in an effort to curb potential prosecutorial abuse in the plea bargaining process. Such alleged abuse, vindictiveness, bad faith, unscrupulous conduct or harrassment on the part of the government, however, neither appears in the respective records nor was even alleged by Cooper or Johnson. This Court recently declined to adopt an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. *United States v. Goodwin*, 457 U.S. 368 (1982). Thus, petitioner submits that the rule announced premised upon the observation that government agents may abuse the plea bargaining process is inappropriate to the facts and should not be permitted to stand. This is especially true in light of this Court's holding in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) and its frank acceptance of the principle as constitutionally legitimate that the prosecutor's interest in plea bargaining is to persuade the defendant to forego his right to plead not guilty. Id. at 364.

If this Court's recognition of the concept of mutuality of advantage in the plea bargaining process is to have meaning [Id. at 363], and petitioner believes it does, then the concept of fundamental fairness expressed in *Santobello* must apply not only to the defendant but to the government as well. Necessarily, fundamental fairness implies flexibility in its application to plea negotiations and thus should not be so restricted or narrowly defined that, in essence, the courts become seated at the bargaining table or assume the posture of scrutinizing bare plea proposals absent allegations that a defendant has been mistreated by egregious conduct on the part of a prosecutor.

Holding a prosecutor to a bad bargain caused by an inadvertent mistake on his part, the basis of which is a misstatement, or any number of innocent reasons, does not benefit either the defendant who is willing to admit his criminal conduct and accept just punishment for his crime

against society or the prosecutor who has an interest in protecting the populace from criminal conduct by seeing that our criminal laws are enforced at a minimum of expense and inconvenience to the citizens of the state. Accordingly, petitioner contends the court below was remiss in holding that Johnson was entitled to specific performance of the prosecutor's plea offer, based on an admitted mistake, absent Johnson's entry of a plea of guilty or other reliance to his detriment on the proposal.

CONCLUSION

For the foregoing reasons, supported by citations to legal authority, petitioner prays that the judgment of the Eighth Circuit Court of Appeals be vacated. It is further prayed that the judgment entered by the district court denying respondent habeas corpus relief be reinstated in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alice Ann Burns, Deputy Attorney General, do hereby certify that a copy of the foregoing Brief has been served upon the respondent herein by placing a copy of same in the U.S. Mail, postage paid, addressed to Richard Quiggle, Attorney at Law, 904 West Second St., P.O. Box 2651, Little Rock, Arkansas, this 15 day of February, 1984.

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